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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 605

HAROLD JOHNSON,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH CIRCUIT.

MYER H. GLADSTONE
134 North La Salle Street
Chicago 2, Illinois
Attorney for Petitioner.

UNITED STATES LAW PRINTING CO. CHICAGO 18, ILL. LAKEVIEW 5 6581

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

HAROLD JOHNSON,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Your petitioner, Harold Johnson, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

Judgment And Opinion of the Court Below.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on April 17, 1958, and is not reported but appears in the printed Appendix before the Court of Appeals for the Seventh Circuit, filed herewith and certified by the Clerk of said Court. The District Court's oral Opinion appears at pages 31-32 of the said Appendix.

The Opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed on October 27, 1958, and is not yet reported but is set forth in the Appendix hereto and in the certified copy of the record.

Jurisdiction.

On November 25, 1958, it was ordered that the Petition for Rehearing be denied (The orders of the Court of Appeals appear in the Appendix to this Petition). This Petition is filed within thirty days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1), 62 Stat. 928

QUESTIONS PRESENTED.

1. Whether the petitioner was not deprived of due process of law where the United States Court of Appeals ignores testimony and facts in evidence in the Trial Court which, if not ignored, should have resulted in a reversal of the Judgment of the District Court.

2. Whether or not there was a complete absence of proof to support the findings and judgment of the District Court and the judgment of the Court of Appeals.

STATUTE INVOLVED.

Section 174, Title 21, U.S.C.A. (Food and Drug Act), as amended 1956.

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000 • • • .
>
> "Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

STATEMENT OF THE CASE.

This petitioner presents for correction, the errors of the District Court of the United States for the Northern District of Illinois, Eastern Division, erroneously affirmed by the United States Court of Appeals for the Seventh Circuit, and also for errors committed for the said Court of Appeals.

The Indictment (App. 3) charged that on February 11, 1958, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the defendants, Harold Johnson and Juanita Warren, did knowingly receive, conceal, buy, sell and facilitate the transportation, concealment and sale, after the importation into the United States, of thirty-one hundred grains of heroin, knowing the same to be imported into the United States contrary to law; in violation of Sec. 174, Title 21, United States Code, as amended by the Narcotic Control Act of 1956.

The petitioner, Harold Johnson, was found guilty by the District Court who heard the case without a jury, and was sentenced to the custody of the Attorney General for imprisonment for a period of five years. The defendant, Juanita Warren, was found not guilty (App. 4).

John Graf, an agent for the Federal Bureau of Narcotics, testified (App. 6-17) that on February 11, at about 9:00 P.M. he saw a 1957 Ford automobile pass the car in which he was seated with another agent, Mr. Wimpey. As the Ford automobile passed them he observed Harold Johnson driving the automobile. Agent Wimpey left the car and Graf followed the Ford. At the corner of Lake and Hoyne Streets he forced the Ford to a stop and got out of his automobile on the passenger side and stepped

over to the Ford. At that time his car and the Ford were just about two feet apart. Graf went to open the door on the driver's side, but before he got the door open he observed a package or bag of some sort being handed by Harold Johnson to the woman sitting next to him. After he opened the door he ordered everyone out and told them they were under arrest. Graf couldn't describe the bag that he just testified about except to say that it was just a brown paper bag (App. 7). He first saw this bag which was Government's Exhibit 1, when it was handed to him on the corner of Hoyne and Lake Streets by agent Robert Taylor.

After Graf placed the defendants under arrest, agent Taylor walked around the Ford automobile to the passenger side and came back with Government's Exhibit 1. Agent Taylor had been in an automobile directly behind Mr. Graf and arrived a minute or so afterwards (App. 7, 8).

The original containers were taken to the office of the Alcohol Tax Unit and delivered to the fingerprint expert, Mr. Howard Doler, for analysis and custody.

On cross examination, Mr. Graf testified that when he first stopped the car he said "Get out of the car" and he was opening the door at that time. He thought that while he was sliding across to the passenger side he yelled, "Keep your hands in sight". He made the two passengers in the front seat, Harold Johnson and Juanita Warren, and also Samuel Moore, a passenger in the back seat of the car, come out on the left hand side, or the driver's side of the car (App. 12).

From the time that Graf pulled up beside the Ford, he couldn't say that he kept all three people in his view at all times, nor did he absolutely see everything that all three did at that time. He was asked if he saw the defendant hand Juanita Warren a brown paper bag, and he replied,

"No sir. I don't know who handed it to whom." At the time he was moving and was trying to get the door open and to watch the man in the rear seat, and he couldn't positively say whether the defendant was handing it to Juanita Warren or whether she was handing it to him. (App. 13).

On further cross examination he testified "I did not know whether Johnson was handing this brown paper bag to Warren or whether Warren was passing it to him. *I did not see it at that time.*" He searched both Harold Johnson and Juanita Warren and also the entire car and didn't find a bag either on them or in the car. It was handed to him by Agent Taylor (App. 14).

On still further cross examination, Mr. Graf testified: "I couldn't positively say that at any time I saw the defendant Harold Johnson with Exhibit 1 in his possession. I cannot say that I ever saw him with Exhibit 1 in his possession. I cannot say that I ever saw the defendant, Juanita Warren, with Exhibit 1 in her possession • • •. I couldn't specifically say that I saw the defendant, Harold Johnson, with any narcotics in his possession on the night of February 11, 1958." (App. 15-16).

Another narcotics agent, Ralph Eckhardt, testified at the time that agent Graf stopped the car in which the defendant was riding, he saw Miss Warren get out of the car on the passenger side and walk around the vehicle to the side that agent Graf was on. At that time he observed Miss Warren drop a package or some article on the pavement. She then walked to the other car. He said she then walked to the other car. He didn't notice the article that was dropped until it was shown to him by agent Taylor. He was able to ascertain that it was an object that was dropped but could not identify it. "*It was picked up and thrown away.*" (App. 17).

Agent Taylor picked up the package, but Mr. Eckhardt did not see him do so. He didn't see agent Taylor stoop over and pick up the package, but immediately afterward, agent Taylor showed him Government's Exhibit 1 (App. 18). On cross examination Mr. Eckhardt testified that Agent Graf was closer to the Ford car than he was and that if agent Graf testified that all three persons got out on the driver's side, he was in error (App. 20).

On further cross examination agent Eckhardt testified that he did not observe in what hand Miss Warren had the object which he said she dropped, and that, "I just noticed an object falling and I was more or less concerned about the placing of the people under arrest rather than paying too much attention to objects in the street or anything." (App. 20). Mr. Eckhardt said he did not see Juanita Warren toss the object. He testified "I saw an object fall, and the person was standing right next to the object, it fell from the person. That is the best I can do. In the process of getting out of an automobile the object fell. I didn't even look at the object when it was on the pavement." (App. 21).

Mr. Eckhardt said he couldn't identify the object that fell nor did he know whether or not the object that agent Taylor picked up was the same that he saw falling through the air. On the night of February 11, 1958, Mr. Eckhardt did not see any narcotics in the possession of the defendant, Harold Johnson, nor any in the possession of the defendant, Juanita Warren. (App. 21).

Mr. Robert Taylor, another narcotics agent, testified that on February 11, 1958, at about 9:00 P.M. he pulled up behind a car driven by Harold Johnson, which had

been curbed by agent Graf. He saw the petitioner and Sam Moore get out of the Ford automobile on the driver's side and Warren getting out of the car on the passenger side. He observed a package slipping down from in front of her skirt. He walked immediately to the right side of the automobile when he saw the package drop and retrieved a brown bag with manila envelopes contained therein (which was Government's Exhibit 1). (App. 23). He showed Government's Exhibit 1 to the other agents.

On cross examination, agent Taylor testified that the observation he made, to which he testified on direct examination, was made while he was sitting behind the steering wheel of his automobile with his headlights on. While he was sitting behind the steering wheel was when he saw Juanita Warren getting out of the car and when he saw a package slide from her skirt (App. 26). He didn't know whether the object he retrieved was the same object he saw slipping from her skirt. (App. 27).

Mr. Taylor noticed two other people standing there on the street who were both males to the best of his memory. Mr. Taylor's automobile was approximately five feet parallel with and behind the Ford automobile (App. 28).

It was stipulated that if the United States Chemist was present he would testify that the containers in Government's Exhibit 1 contained 3,103 grains of heroin hydrochloride which was adulterated with quinine, mannitol and lactose (App. 28).

No evidence was introduced by the Government to show that the defendant's fingerprints were on Government's Exhibit 1 or any of the containers within that exhibit.

Harold Johnson, the defendant, testified in his own behalf (App. 29-31) that he didn't have any bag or narcotics on his person or in his car. He denied handing Miss Warren any type of brown package or that she handed him one. He got out on the left side of the car and she followed him (App. 31). The defendant testified that he was thirty years old and that when he was seventeen years of age he was convicted of robbery and served eleven years in the State Penitentiary. He was released August 16, 1956 (App. 29).

The District Court found that the petitioner, Harold Johnson, had possession of narcotics and that, because he had a record, "When he saw what was happening," he passed the narcotics to his lady companion. The Court found the petitioner, Harold Johnson, guilty and found Juanita Warren not guilty (App. 31-32).

REASONS FOR GRANTING WRIT.

I.

The Court of Appeals, in its opinion, ignored testimony introduced by the Government that proved beyond a reasonable doubt that the petitioner was *not guilty* of the possession of the narcotics described in the indictment. The opinion of the Appellate Court recited the following pertinent facts:

Narcotics Agent, John Graf, stopped the automobile driven by the petitioner. He got out of his automobile and approached the petitioner's car from the driver's side and saw the defendant hand a brown paper bag to the co-defendant, Juanita Warren, who sat beside the defendant in the front seat of the automobile.

The Court of Appeals noted that Agent Graf, on cross examination, *modified* his statement to the effect that the brown paper bag passed between the petitioner and Juanita Warren, but he did not know which one had handed it to the other. The opinion further stated that agents Eckhardt and Taylor testified that Juanita Warren got out on the passenger side of the petitioner's car and that as she emerged, Juanita Warren dropped a package and that they saw it fall. Agent Taylor said that he immediately picked the package up and that it was Government's Exhibit 1.

The testimony of agent Graf, however, on cross examination, more than "modified his original statement". His cross examination disclosed that he did not see any package pass between the petitioner and Juanita Warren. He didn't know who handed the brown paper bag to whom. His literal testimony was: "I did not know whether Johnson was handing this brown paper bag to Warren or

whether Warren was passing it to him. I did not see it at that time." A search of the petitioner and Juanita Warren and of the car disclosed that no narcotics was present, either on the persons of the defendants or in the car (App. 14).

Graf's further testimony indicated, without equivocation, that he never saw Harold Johnson with the narcotics, Exhibit 1, in his possession, nor that he ever saw Exhibit 1 in Juanita Warren's possession. His testimony was: "I couldn't positively say that at any time I saw the defendant, Harold Johnson, with Exhibit 1 in his possession. I cannot say that I ever saw him with Exhibit 1 in his possession. I cannot say that I ever saw defendant Juanita Warren, with Exhibit 1 in her possession * * *. I couldn't specifically say that I saw the defendant, Harold Johnson, with any narcotics in his possession on the night of February 11, 1958." (App. 15-16). All this testimony was ignored or overlooked by the Court of Appeals.

Agent Ralph Eckhardt testified that he observed Miss Warren drop a package on the pavement, but didn't notice what was dropped and couldn't identify the object. He testified with reference to the object that was dropped by Miss Warren: "It was picked up and thrown away." He didn't see Juanita Warren toss the object (App. 21). He didn't see any narcotics in the possession of the petitioner nor any in the possession of Juanita Warren (App. 21).

Agent Taylor merely testified that he saw a package slipping from the front of Miss Warren's skirt (App. 23), but didn't know whether the object he retrieved was the same object he saw slipping from her skirt (App. 27). He observed all of this while he was sitting behind the steering wheel of his automobile. The petitioner insists that while sitting in such a position *it was impossible* for him to

see anything that might be dropped from Miss Warren's skirt because the rear, right hand part of the petitioner's automobile would have completely obscured his vision of anything that might have dropped from Miss Warren's skirt.

Since Mr. Eckhardt testified that the object Miss Warren dropped "was picked up and thrown away," obviously the object that was picked up by Mr. Taylor could not have been the one that was thrown away. Two other people were standing on the street at the time these matters were occurring (App. 28). None of the foregoing facts was given any consideration by the Court of Appeals or by the District Court but were completely ignored by the Court of Appeals in its opinion.

The petitioner respectfully submits that these facts should have been considered by the Court of Appeals; that the foregoing facts testified to by agent Graf on cross examination did not "modify" his testimony on direct examination but were a complete refutation of his testimony on direct examination.

The failure of the Court of Appeals to give effect to all of the testimony in evidence, which, if considered by them, should have resulted in a reversal of the District Court judgment, has so far departed from the accepted and usual course of judicial proceeding as to deprive the petitioner of due process of law and as to call for the exercise of this Court's power of supervision. A similar situation arose under the Fourteenth Amendment to the Constitution of the United States in a case where an appeal is given by the statute of a State court. In *Frank* v. *Mangum*, 237 U.S. 309, 327, 35 S. Ct. 582, 59 L. Ed. 969, where this Honorable Court held:

> "While the Fourteenth Amendment does not require that a State shall provide for an appellate review

in criminal cases (*McKane* v. *Durston*, 153 U.S. 684, 687; *Andrews* v. *Swartz*, 156 U.S. 272, 275; *Rogers* v. *Peck*, 199 U.S. 425, 435; *Reetz* v. *Michigan*, 188 U.S. 505, 508), it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment."

II.

The Court of Appeals, after citing Section 174 of Title 21, to the effect that possession of narcotic drugs creates a presumption of guilt and shifts explanation of the possession of narcotics to the defendant, stated: "Defendant here offered no explanation. He merely denied possession." In denying possession, however, petitioner merely corroborated the Government which failed utterly to place possession of the narcotics in the petitioner. The Court of Appeals further noted that the trial judge, "sole trier of credibility here", stated that he disbelieved Harold Johnson's testimony. This testimony denied possession. In disbelieving the petitioner's testimony, we come back to the Government's testimony, which, it has been pointed out, failed to prove that the petitioner had possession of the narcotics. Therefore, the defendant's testimony corroborated the Government's testimony and the Government's testimony, in turn, corroborated the defendant's.

Since each of the Government's witnesses testified that he did not see any narcotics in the petitioner's possession, nor the package containing the same, the sole circumstances upon which the Government could even remotely rely to prove possession by anyone in the petitioner's car, would be the testimony of agents Eckhardt and Taylor, who saw

an "object" fall on the pavement. The object which was dropped, according to Eckhardt, was "picked up and thrown away", and hence, since only one object *was seen to have* been dropped by or from Miss Warren and this object having been thrown away, the object which was picked up by agent Taylor, could not have been the one dropped by Miss Warren.

There were, however, two men standing "there in the street" according to Mr. Taylor; it could well be that one of these two men, seeing federal officers on the spot, dropped the package that was retrieved by agent Taylor.

Every bit of Government testimony in evidence points to the innocence of the defendant. The Court of Appeals, in concluding that the evidence recited was sufficient to sustain a conviction, is in direct conflict with decisions of another circuit, particularly *Rodriguez* v. *United States*, 232 F. 2d 819 (5th Cir. 1956); *Duran* v. *United States*, 234 F. 2d 932 (5th Cir.); *Guevara* v. *United States*, 242 F. 2d 745. The decision of the Court of Appeals is also in conflict with a previous decision of the Seventh Circuit: *United States* v. *Levy*, 138 F. 2d 429, 430-431.

Both the judgment of the District Court and the Court of Appeals are in conflict with the decision of this Court in the case of *Holland* v. *United States*, 348 U. S. 121, 139, 75 S.Ct. 127, 99 L. Ed. 150.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MYER H. GLADSTONE,
of Chicago, Illinois
Attorney for Petitioner

APPENDIX A.

In the

United States Court of Appeals

For the Seventh Circuit

No. 12355

SEPTEMBER TERM, 1958—SEPTEMBER SESSION, 1958

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HAROLD JOHNSON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

OCTOBER 27, 1958

Before DUFFY, *Chief Judge*, PARKINSON and KNOCH, *Circuit Judges.*

KNOCH, *Circuit Judge.* Harold Johnson and Juanita Warren were charged by Grand Jury indictment with having fraudulently and knowingly received, concealed, bought, sold and facilitated transportation, concealment and sale after importation into the United States of a quantity of heroin hydrochloride, knowing it to be imported into the United States contrary to law. (Title 21, U. S. C. §174, as amended by the Narcotics Control Act of 1956.) Both pleaded not guilty and were tried by the District Court without jury. Juanita Warren was found not guilty. Harold Johnson was found guilty. He appeals that finding.

Under Title 21, U. S. C. §174[1] possession of narcotic drugs creates a presumption of guilt and is deemed sufficient evidence to authorize conviction unless the defendant satisfactorily explains the possession.[2]

Defendant here offered no explanation. He merely denied possession.

The matter comes before us on the sole contested issue of whether or not the evidence, viewed in the light most favorable to the government, was sufficient to justify the District Court's finding, as a fact, that defendant had possession of the heroin hydrochloride.

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[1]The pertinent portion of the Statute reads: . . .

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

[2]In *United States* v. *White*, 956, 228 F. 2d 832, this Court held (at p. 834): "Having already found that there was evidence of possession, we hold that the government had a right to rely upon the statutory provision which has the effect of raising a presumption that the drug had been imported contrary to law, *Pon Wing Quong* v. *United States*, 9 Cir., 111 F. 2d 751, at page 755, and that defendants had knowledge of such unlawful importation. In *United States* v. *Feinberg*, 7 Cir., 123 F. 2d 425, at page 427, we said: 'By the force of the statute, possession of narcotics gives rise to an inference that the narcotics were imported contrary to law and a further inference that the person in possession had knowledge of such unlawful importation. True it is, a defendant on trial may overcome these inferences by satisfactory proof that in his case possession of narcotics did not involve a violation of the statute, either because the narcotics were not imported contrary to law or because he had no knowledge of unlawful importation . . . .'

"To the same effect are *United States* v. *Chiarelli*, 7 Cir., 192 F. 2d 528, at page 531, and *United States* v. *Holmes*, 7 Cir., 187 F. 2d 222, at page 223.'

Defendant Harold Johnson testified in his own behalf, but the Trial Judge, sole trier of credibility here,[3] stated that he disbelieved Harold Johnson's testimony and could not take it as of any consequence.

It is undisputed that government's exhibit #1, a brown paper bag, did contain heroin hydrochloride.

The government's witness John Graf, agent for the Federal Bureau of Narcotics, testified that, in a government vehicle, he had followed an automobile driven by defendant, at a high rate of speed, from the corner of Hoyne and Monroe Streets, north to the corner of Hoyne and Lake Streets, in Chicago, where he forced it to a stop; that as he got out on the passenger side of his vehicle, on the left of the automobile driven by defendant, approaching it from the driver's side, he saw defendant hand a brown paper bag to Juanita Warren who sat beside defendant in the front seat of the automobile. On cross-examination, agent Graf modified his original statement, and said that the brown paper bag had passed between defendant Harold Johnson and Juanita Warren, but that he did not know which had handed it to the other.

Two other agents, Ralph Eckhardt and Robert J. Taylor, testified that they had followed agent Graf in another government vehicle from which they alighted at the corner of Hoyne and Lake Streets, directly behind the automobile driven by the defendant, and that they saw its passengers getting out.

---

[3]In determining if there is sufficient evidence to support a conviction, it is not the role of an appellate court to weigh conflicting testimony. The weight to be given and the credibility to be attached to the testimony of the witnesses is a matter for determination by the trier of the facts. *United States* v. *Cook*, 7 Cir., 1950, 184 F. 2d 642, 644; *United States* v. *Detente*, 7 Cir., 1952, 199 F. 2d 286, 288; *United States* v. *White*, 7 Cir., 1956, 228 F. 2d 832, 833; *United States* v. *Green*, 7 Cir., 1957, 246 F. 2d 155, 158.

There was a conflict of evidence in that agent Graf testified that, at his command, Harold Johnson, Juanita Warren and a second man in the rear seat, all left their automobile on the driver's side. Agents Eckhardt and Taylor said that Juanita Warren got out on the passenger's side and walked around the rear of the automobile to the driver's side where agent Graf, Harold Johnson, and the second male passenger were standing.

Agents Eckhardt and Taylor both testified that as she emerged from the automobile, Juanita Warren dropped a package and that they saw it falling. Agent Taylor said that he immediately picked it up and that it was government's exhibit #1.

Agents Graf and Taylor testified further that the automobile and its three passengers were searched; no other bag was found. The circumstances set out in the testimony, if believed, disclose a case against defendant.[4]

The Trial Court noted that there was some discrepancy between the witnesses but found sufficient and ample testimony to satisfy him beyond a reasonable doubt that defendant Harold Johnson knowingly had possession of the narcotic drug.

We find the District Court's action justified.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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[4]With respect to circumstantial evidence, this Court said: "We know of no reason, however, why possession proven by circumstantial evidence should be treated any differently from possession proven by direct evidence. In any event, this same theory was advanced and rejected by this court in *United States* v. *Pisano*, 7 Cir., 193 F. 2d 355, 360. . . ." (*United States* v. *Pinna*, 7 Cir., 1956, 229 F. 2d 216, 218)

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

MONDAY, OCTOBER 27, 1958

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. W. Lynn Parkinson, Circuit Judge
Hon. Win G. Knoch, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. HAROLD JOHNSON *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12355

This cause came on to be heard on the transcript of the record from the United States District Court for the NORTHERN District of ILLINOIS, EASTERN Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

TUESDAY, NOVEMBER 25, 1958

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. W. Lynn Parkinson, Circuit Judge
Hon. Win G. Knoch, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. HAROLD JOHNSON, *Defendant-Appellant.* No. 12355	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of BRIEF AND APPENDIX FOR APPELLANT FILED AUGUST 2, 1958; OPINION FILED OCTOBER 27, 1958; JUDGMENT ENTERED OCTOBER 27, 1958; ORDER DENYING PETITION FOR REHEARING ENTERED NOVEMBER 25, 1958 in

Cause No. 12355

UNITED STATES OF AMERICA

vs.

HAROLD JOHNSON

---

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this FIFTH day of DECEMBER A. D. 1958.

(SEAL OF COURT)

s/ KENNETH J. CARRICK
Clerk of the United States Court of Appeals
for the Seventh Circuit.

No. 605

In the Supreme Court of the United States

OCTOBER TERM, 1958

HAROLD JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM ANDERSON,
Special Assistant to the Attorney General,

BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys,

Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 605

HAROLD JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–4; A. 33–36)[1] is reported at 260 F. 2d 508.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5; A. 37) was entered on October 27, 1958 (A. 37). A petition for rehearing was denied on November 25, 1958 (Pet. App. 6; A. 38). The petition for a writ of certiorari was filed on December 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "A." refers to the Appendix filed in the court of appeals.

QUESTION PRESENTED

Whether the evidence was sufficient to support the verdict.

STATUTE INVOLVED

21 U.S.C. 174 provides as follows:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. * * *.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

In a trial without a jury, petitioner was found guilty of knowingly receiving, concealing and facilitating the transportation or sale of heroin, knowing the same to be imported into the United States, in violation of 21 U.S.C. 174 (A. 3, 4). He was sentenced to a term of imprisonment for a period of 5

years (A. 4).[2] On appeal, the judgment of conviction was affirmed (A. 37).

The evidence adduced at the trial was as follows:

On February 11, 1958, Government agents surveilling petitioner saw him drive by in a car with co-defendant Juanita Warren in the front seat and another person in the back seat. Agent Graf stopped the car. He testified on direct examination that as he went to the driver's side, but before he opened the door, he saw petitioner hand a brown paper bag to Juanita Warren. He then opened the door, ordered all the occupants out of the car and arrested them (A. 7). Agent Eckhardt testified that he saw Juanita Warren get out of the car on the passenger side, walk around to the other side of the car and drop a package (A. 17). Another agent, Robert Taylor, testified that he saw all three passengers leave the car, as ordered, and saw a package slip from Juanita Warren's skirt as she left the car. He picked up the package, found that it was a brown bag which contained manila envelopes and gave it to Agent Graf (A. 7, 8, 23).[3] Upon analysis, the envelopes were found to contain heroin hydrochloride (A. 28).

On appeal and here, petitioner's complaint about the evidence relates largely to discrepancies in the testimony of Government witnesses as follows:

Agent Graf, on cross-examination, testified as to the brown paper bag that "I don't know who handed it

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[2] His co-defendant, Juanita Warren, was found not guilty.

[3] Agent Graf searched both defendants and the car at the time of the arrest but did not find a bag either on them or in the car (A. 14).

to whom * * * I did not know whether Johnson was handing this brown paper bag to Warren or whether Warren was passing it to him. I did not see it at that time" (A. 13–14). He further testified on cross-examination "I couldn't positively say that at any time I saw defendant Harold Johnson with Exhibit 1 (the narcotics) in his possession. I cannot say that I ever saw him with Exhibit 1 in his possession. I cannot say that I ever saw the defendant, Juanita Warren, with Exhibit 1 in her possession * * *. I couldn't specifically say that I saw the defendant, Harold Johnson, with any narcotics in his possession on the night of February 11, 1958" (A. 15–16).

Agent Ralph Eckhardt testified that the package which Juanita Warren dropped was "picked up and thrown away." Then he said that he did not notice the article that was dropped until it was shown to him by Agent Taylor (A. 17). He did not see Taylor pick up the package and did not know that Taylor had picked it up until Taylor showed him the package. Eckhardt could not identify the object, but he was certain that he saw an object fall from Juanita Warren (A. 17, 18, 20, 21). Eckhardt further testified that he did not see any narcotics in petitioner's or Juanita Warren's possession (A. 21).

Agent Taylor was consistent in his testimony both on direct and cross-examination.

Petitioner, testifying on his own behalf, denied the possession of any narcotics and denied that he handed any package to Juanita Warren (A. 29–31).

The trial court, on the basis of the foregoing evidence, found that petitioner had possession of the

narcotics and that, because he had a criminal record, "when he saw what was happening," he handed over the narcotics to Juanita Warren (A. 31).

ARGUMENT

Petitioner attacks only the weight of the evidence, an inquiry foreclosed by the verdict of the court. *Craig* v. *United States,* 81 F. 2d 816, 827 (C.A. 9). This Court, in examining the record, must take the view of the evidence most favorable to the Government and must give to the Government the benefit of all the inferences which reasonably may be drawn from the evidence. *Glasser* v. *United States,* 315 U.S. 60. The weight to be given to testimony in the face of inconsistencies and the resolution of conflicting testimony is for the trier of fact. The record here shows, as both courts below held (*Kann* v. *United States,* 323 U.S. 88, 93; *United States* v. *Johnson,* 319 U.S. 503, 518; *Delaney* v. *United States,* 263 U.S. 586, 589–590), that substantial evidence supports the verdict. There is no occasion for further review of the evidence by this Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. Lee Rankin,
Solicitor General.
Malcolm Anderson,
Assistant Attorney General.
Beatrice Rosenberg,
Felicia Dubrovsky,
Attorneys.

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